of property by that decision to prosecutions under any law e.g. the Customs Enactment, which specifically provides for an order of forfeiture being made.

If this sub-section does not give a general power of forfeiture there would be no power, for instance, for a Court to order the forfeiture of any fire-arm, where a person is convicted for the offence of carrying arms, or to order forfeiture of the weapon used by a person convicted of murder.

Finally, counsel for the applicant referred us to the recent case of *Chee Ng v. Public Prosecutor*[4] in which Evans J. held that since the Penal Code makes special provision as to the cases in which forfeiture of property is a proper punishment e.g. sections 126, 127 and 169, it is only in those cases that the Court can make an order for forfeiture or confiscation of property under sub-section (ii) of section 407 of the Criminal Procedure Code. In view of our decision in this matter that case is now over-ruled.

Appeal Dismissed.

SETAPAK TIN SYNDICATE LTD. AND ANOTHER v. CHOO KIM PENG.

[Orig. Civil Juris. (Willan, C.J.) August 30, 1947]

Civil Procedure Code (F.M.S.) Section 500 — Motion to appoint Interim Receiver — when order can be made by the Court.

In this case the Setapak Tin Syndicate Ltd. (in voluntary liquidation) and the Ban Hock Hin Mining Company Ltd. (in voluntary liquidation) applied by their respective liquidators by motion for an order that an interim receiver be appointed of certain mining property in Kuala Lumpur.

The facts were shortly as follows:—On the 27th day of May 2603 (1943) during the Japanese occupation, the first plaintiff-company granted an option to the second plaintiff-company to purchase the mining property in question. The second plaintiff-company exercised the said option and agreed to sell the property to the defendant. The defendant agreed to purchase the said property, and the first plaintiff-company agreed to give a transfer and assignment direct to the defendant. An agreement was entered into to that effect and the purchase price agreed upon was $650,000.00 which was paid by the defendant. By that agreement, the defendant was entitled to enter into possession of the said property, as at the date of the agreement notwithstanding that the necessary transfers and assignments had not been executed. The agreement is dated the 19th day of August 1943, and from that date the defendant went into possession of the said property. The two plaintiff companies in the present suit sought to set aside the agreement of the 19th of August 1943 and it was in connection with this suit that the motion for the appointment of an interim receiver was filed.

Held, (1) that before the Court can make an order for the appointment of an Interim Receiver it must be satisfied (a) that the plaintiff has established a good **prima facie** claim to title and also (b) that the property is in jeopardy or (c) at the very least that the party who makes the application will be in a worse situation if the appointment of a receiver is delayed; (2) that on the facts of this case, the plaintiffs have not established a **prima facie** claim to title and so the Court would not be justified in appointing an Interim Receiver and turning the defendant out of possession (3) that on the facts, it had not been proved that the property was in jeopardy and that this was an additional ground for not acceding to the motion to appoint an Interim Receiver.

Cases referred to :—

(1) *Gibbs v. David* L.R. 20 Eq. 373.

(2) *George v. Evans* 160 E.R. 932.

(3) *Owen and Gutch v. Homan* 4 H.L.C. 997.

ON A NOTICE OF MOTION.

E. D. Shearn for the plaintiffs.

Roland Braddell for the defendant.

Willan, C. J. : — This is a motion by the plaintiffs for an order that an Interim Receiver be appointed of mining property, plant, machinery, buildings, stores and other assets situated on land comprised in certain mining leases and mining certificates in the township of Kuala Lumpur.

On the 27th day of May, 2603 (1943), during the Japanese occupation of Malaya, the first plaintiff-company granted an option to the second plaintiff-company to purchase certain mining property. The second plaintiff-company exercised the said option and agreed to sell the property to the defendant. The defendant agreed to purchase the said property, and the first plaintiff-company agreed to give a transfer and assignment direct to the defendant.

An agreement was entered into to that effect, and the purchase price agreed upon was $650,000, which was paid by the defendant. By that agreement the defendant was entitled to enter into possession of the said property, as at the date of the agreement, notwithstanding that the necessary transfers and assignments had not been executed. The agreement is dated the 19th day of August, 1943, and from that date the defendant has been in possession of the said property.

The defendant is a landowner and miner, and the plaint in this suit avers that at the time of that agreement he was a director of the second plaintiff-company.

The two plaintiff-companies seek to set aside the agreement of the 19th day of August, 1943, on the grounds that :—

(1) The second plaintiff-company executed the agreement aforesaid by coercion and or undue influence brought by the Japanese

Authorities, in which coercion and/or undue influence the defendant took part; alternatively

(2) That the defendant represented to the second plaintiff-company that he was acting as an agent for others in the matter of the purchase of the said property, whereas he acquired it for himself, and this he was not competent to do in view of the fact that he was a director of the said second plaintiff-company.

The motion for the appointment for an Interim Recieiver is supported by the affidavit of the Chairman of the Board of Directors of the second plaintiff-company in which the following allegations are made regarding the mine :—

(a) It is in an abandoned condition;

(b) Looting has taken place;

(c) Illegal mining has taken place;

(d) Valuable plant and machinery are not properly protected from the weather;

(e) It is flooded;

(f) There is a risk of lallang fires;

(g) No proper watchmen are employed to protect the mine and the mining equipment thereon.

The power of this Court to appoint a receiver is contained in section 500 of the Federated Malay States Civil Procedure Code. That section, so far as is relevant, reads as follows :—

> Where it appears to the Court to be just and convenient the Court may by order —
>
> (a) appoint a receiver of any property, whether before or after decree;

It is clear from English decided cases that the words "just or convenient" who appear in section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 — the section which empowers the High Court in England to appoint receivers — are to be read as "just and convenient", and therefore our local law and the case law of England being in *pari materia* English decided cases can be followed here.

Mr. Roland Braddell, for the defendant, in resisting this motion for the appointment of an Interim Receiver, submitted that before any such appointment is made the Court must be satisfied on the two following matters :—

(1) That the plaintiffs will probably succeed at the hearing of the suit, and

(2) That the appointment is just and convenient, i.e. that it is just and convenient according to legal principles.

He cited *Hailsham*, vol. 28, page 18, paragraph 27, as the authority for that proposition.

Mr. Shearn, for the plaintiffs, submitted that it was sufficient to show that the assets were in jeopardy, and in support of that submission cited the cases of *Gibbs v. David*[1] and *George v. Evans*[2]. Mr. Shearn also referred me to *Kerr* on Receivers, 11th Ed: page 6, where the learned author states :—

> If the Court is satisfied upon the materials it has before it that the party who makes the application has established a good **prima facie** title, and that the property the subject-matter of the proceedings will be in danger if left until the trial in the possession or under the control of the party against whom the receiver is asked for, or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed, the appointment of a receiver is almost a matter of course.

I am satisfied from an examination of several decided English cases that the proposition put forward by Mr. Braddell is a correct general statement of the law and that the cases and the passage from Kerr cited by Mr. Shearn are not in conflict with that general statement.

Dealing first with the case of *Gibbs v. David* (supra), the facts in that case are that the plaintiffs purchased a colliery from the defendants, entered into possession thereof and worked it. They sought to set aside the sale on account of fraud by the defendants and to recover from the defendants the sums paid to them. It is clear from the argument of Counsel in their case that the plaintiffs were in possession and had kept the mine running as a going concern, but that on account of the fact that the expenses of working the colliery were greater than the profits arising therefrom, they, the plaintiffs, wished a receiver to be appointed. This statement by Counsel is borne out by the following passage in the judgment of Vice-Chancellor Walins at page 377 :—

> The plaintiffs are in possession; they say they were fraudulently induced to take possession, and being in possession they are incompetent to deal with the property in its present position.

Thus that case is different from the one before me. In that case it was an application by the plaintiffs themselves, who were in possession, to have a receiver appointed because they were incompetent to keep the colliery as a going concern.

In the case before me the mine is not being run at all, and it is admitted that it cannot be run at present either by the defendant or by anyone else.

Further, the application is by plaintiffs, who are out of possession, to turn out the defendant, who is in possession.

With regard to the case of *George v. Evans* (supra) Mr. Shearn relied on the following passage from Baron Alderson's judgment, p. 984 :—

> But in the meanwhile the defendant has, at all events, a claim upon the property for a certain sum, and unless there be some precedent to show me that I can interfere in this intermediate stage of the cause where the contract has not yet been set aside, or unless it be distinctly shown me that the property is likely to perish from the neglect or misconduct of the defendant....

The particular words in that passage relied on by Mr. Shearn are :—

> or unless it be distinctly shown me that the property is likely to perish from neglect or misconduct of the defendant

and he argues that since those words stand on their own by the use of the disjunctive first word "or" therein, that it is sufficient to show that the property is in jeopardy. I have puzzled for some considerable time over this passage from the judgment of Baron Alderson, and if it means what Mr. Shearn contends, it means then it is in conflict with many other decided cases. That case is cited in Hailsham, vol. 28, page 21, paragraph 34, for the authority that a receiver will not be appointed unless the property is in danger. But that whole paragraph reads as follows :—

> In numerous cases persons who show a prima facie interest in property of any sort may, in a properly constituted action, if it appears to the Court to be just and convenient, have a receiver appointed for its protection; but the appointment is not made unless the property is in danger, and the proper parties are before the Court.

Thus, reading that paragraph as a whole it appears clear that the Court must be satisfied on two matters first that the party applying for a receiver must have a *prima facie* interest in the property, and secondly that the property must be in danger.

Lastly, the passage from Kerr referred to by Mr. Shearn and set out above. To me it is clear that that passage also supports Mr. Braddell's contention that the Court must be satisfied :—

(1) That the plaintiff has established a good *prima facie* claim to title, and also

(2) That the property is in jeopardy, or

(3) At the very least that the party who makes the application will be in a worse situation if the appointment of a receiver is delayed.

To me this means that in all cases the plaintiff must prove (1) and also (2) or at least (3), though there can be exceptions to this as in the case of *Gibbs v. David* (supra) where the plaintiff in possession applied for the appointment of a receiver himself.

As regards the fact as to whether the plaintiffs have shown a good *prima facie* claim to title, I can only look to the plaint which contains the two grounds, already mentioned in this judgment, on which the agreement of the 19th day of August, 1943, is sought to be set aside. There has not yet been sufficient time in which to file any defence in this suit, but there can be no doubt that when a defence is filed it will traverse the allegations in the plaint that there was any coercion and or undue influence on the part of the defendant or that he, as a director of the second plaintiff-company, acted at all improperly. The affidavits filed in support of this motion do not deal with the question of whether the plaintiffs have a *prima facie* claim to title, presumably because they rely on the averments made in the plaint itself.

Looking at the plaint, there are the following salient facts in favour of the defendant :—

(1) He bought this mining property by outright sale.

(2) He paid the purchase price for it.

(3) He went into possession as from the date of sale i.e. the 19th day of August, 1943, and has been in possession ever since.

As stated in Kerr on Receivers, 11th ed. page 5 :—

> Where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case presents more difficulty.

This statement is borne out by the case of *Owen Gutch v. Homan*[3], where it is stated :—

> Where there is more of doubt, there is of course more of difficulty; the question is one of degree, as to which, therefore, it is impossible to lay down any precise and unvarying rule. In this case Lord Truro did not think the title of the plaintiffs was so clearly made out as to justify the Court in turning the defendant out of possession before the plaintiffs had finally established their right....

In the case before me, bearing in mind the three salient facts set out above, and also having carefully examined the plaint, I do not consider that I am justified in appointing an Interim Receiver and turning the defendant out of possession.

Accordingly this motion must fail on that ground.

I think that since the question of the mining property being in jeopardy was fully argued before me, I should also express my views on that question.

The allegations that the mining property in question is in jeopardy are contained, as already stated, in the affidavit of the Chairman of the Board of

Directors of the second plaintiff-company and those allegations are set out again here. They are that :—

(a) The mine is in an abandoned condition;
(b) Looting has taken place;
(c) Illegal mining has taken place;
(d) Valuable plant and machinery are not properly protected from the weather;
(e) The mine is flooded;
(f) The mine is subject to the risk of fires;
(g) The mine is not properly protected, because no watchmen are employed.

These allegations are denied by the defendant in his affidavit in reply to the affidavit of the Chairman of the Board of Directors of the second plaintiff-company already mentioned. In addition, the defendant has exhibited a report on this mining property by an independent Consulting Mining Engineer, Mr. Hamplen Jones, and this report refutes and answers the allegations that mining property is in jeopardy.

On the facts before me I am unable to find it proved that this property is in jeopardy. This finding of fact is an additional reason why I am unable to accede to this motion to appoint an Interim Receiver.

The motion is accordingly dismissed with costs to the defendant.

Motion Dismissed.

HAJI MOHAMED BIN HAJI PUTEH v. HAKIM S. M. ANWARI ALI SHAH.

[Orig. Civil Juris. (Willan, C.J.) August 27, 1947]

Landlord and tenant — Rent and Charged Land (Restriction) Enactment (F.M.S.) 1940, Section 7 — Material date at which rent should be in arrears in order that a Landlord may succeed in a suit in Court to recover his premises without the permission of the Rent Assessment Board.

In this case the premises in question No. 90 Batu Road, Kuala Lumpur, formed part of the estate of Jali Urani binte Haji Samad of which the Plaintiff was the administrator. The defendant was a monthly tenant of the premises since 1939. In or about the month of February 1946 the defendant left for India, leaving one Shukur Din as his attorney in Malaya. From the evidence it was clear that the defendant's attorney did not live on the said premises, but that he as defendant's attorney, carried on a partnership business there. The plaintiff admitted in evidence that the plaintiff's attorney resided at 77 Java Street, Kuala Lumpur and he also admitted that it was from this address that he usually received letters from him. On the 15th day of February 1947, since the rent for January 1947 had been in arrears for fourteen days, the plaintiff sent by A.R. post a notice to quit addressed to the defendant's attorney at No. 90 Batu Road, Kuala Lumpur. This was returned to the Plaintiff undelivered. On the 18th day of February 1947 the plaintiff received by registered post a cheque from the defendant's attorney for the arrears of rent due. On the 21st of February 1947, the plaintiff again sent by A.R. post the notice to quit addressed to the defendant's attorney at No. 77 Java Street, Kuala Lumpur. This time the notice was received but by then the defendant's attorney had tendered the arrears of rent due. The defendant's attorney refused to give vacant possession and the plaintiff thereupon instituted the present suit. It was argued for the plaintiff (1) that the proviso to section 7 of the Rent and Charged Land (Restriction) Enactment applied whenever the rent has been in arrear for fourteen days and that it was immaterial that the arrears of rent had been tendered before the notice to quit came to the notice of the defendant's attorney (2) that the defendant's attorney had deliberately evaded service by refusing to accept the first A.R. letter, which contained the notice to quit.

Held, (1) that the material date at which rent should be in arrears in order that a landlord may succeed in a suit in Court to recover his premises without permission of the Rent Assessment Board is the date of the service of the notice to quit; (2) that there was in this case no evidence of deliberate evasion on the part of the defendant's attorney and (3) that as the defendant's attorney was not in arrears with his rent when the notice to quit came to his notice, the plaintiff must fail in his suit.

Case referred to :—

(1) *Hogg v. Brooks* 15 Q.B.D. 256.

CIVIL SUIT.

W. G. W. Hastings for the Plaintiff.

A. K. Sen for the Defendant.

Willan, C. J. : — In this case the plaintiff is the administrator of the estate of Jali Urani binti Haji Abdul Samad, deceased, and the premises known as No. 90 Batu Road, Kuala Lumpur, form part of that estate.

The defendant has been a monthly tenant of those premises since the year 1939, first at a monthly rental of forty dollars, and subsequently this rent was increased to fifty-five dollars per month.

In or about the month of February, 1946, the defendant left for India, leaving one Shukur Din as his attorney in this country.

From the evidence it is clear that the defendant's attorney did not live on the said premises, but that he, as defendant's attorney, carried on a partnership business there.

The plaintiff admitted in evidence that the defendant's attorney resided at No. 77 Java Street, Kuala Lumpur, and he also admitted that it was from this address that he had usually received letters from him.

Since the rent for January, 1947, had been in arrears for fourteen days the plaintiff, on the 15th day of February, 1947, sent by A. R. post a notice to